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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16

17 KASSONDRA BAAS and KELLY LOFQUIST,
individually and on behalf of all others
18 similarly situated,

19 Plaintiffs,

20 v.

21 DOLLAR TREE STORES, INC.,

22 Defendant.
23
24
25
26
27
28

CASE NO. C 07-03108 JSW

**DEFENDANT DOLLAR TREE
STORES, INC.'S NOTICE OF
MOTION AND MOTION TO DENY
CLASS CERTIFICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

DATE: April 4, 2008
TIME: 9:00 a.m.
DEPT.: Crtrm. 2, 17th Floor
JUDGE: Hon. Jeffrey S. White

COMPLAINT FILED: June 13, 2007
TRIAL DATE: No date set.

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NOTICE OF MOTION AND MOTION TO DENY CLASS CERTIFICATION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 4, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 2 of the above-entitled Court, located at 450 Golden Gate Ave., 17th Floor, San Francisco, CA, Defendant, Dollar Tree Stores, Inc. ("Dollar Tree") will, and hereby do, move for an order, pursuant to Federal Rules of Civil Procedure 23(c) and (d), denying class certification of the claims filed by plaintiffs Kassondra Baas and Kelly Lofquist on behalf of themselves and all others similarly situated.

This Motion is based upon this Notice of Motion and Motion to Deny Class Certification, the Memorandum Of Points and Authorities in support thereof, the Declarations of Robert Crandall, Paula Brady, David McDearmon, Steve Pearson, Charlotta Jacobson-Allen and Beth Hirsch Berman, the Request for Judicial Notice as well as all records and proceedings in this action, and on such other and further matters as may be presented to the Court in connection with the hearing on this Motion to Deny Class Certification. This Motion is brought pursuant to Federal Rules of Civil Procedure 23(c) and (d).

DATED: February 29, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

By: _____ / S /
ALEX HERNAEZ

Attorneys for Defendant
ALTA BATES SUMMIT MEDICAL
CENTER

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kassondra Baas ("Bass") and Kelly Lofquist ("Lofquist") (collectively "Plaintiffs"), both former Assistant Managers for Dollar Tree Stores, Inc. ("Dollar Tree") in its Rohnert Park store, number 1868, brought this case as a class action alleging that Dollar Tree had corporate-wide policies and practices that denied all "non-exempt store employees" in California regular and overtime pay. Plaintiffs seek to have this action certified as a class action with them as the class representatives. Although Plaintiffs allege six separate causes of action, all of the causes of action stem from one alleged wrong – alleged wrongful manipulation of employee time records. Dollar Tree vigorously denies the allegations, and further denies that this is a suitable case for class treatment.

Dollar Tree is a public company with its headquarters in Chesapeake, Virginia. It is a single price point discount variety store retailer selling all merchandise for \$1.00 (in some cases 2 or 3 for \$1.00) carrying a broad assortment of goods such as health and beauty items, household cleaners, foods and beverages, seasonal goods, toys, party goods, stationery, pet supplies, glassware and automotive products. Dollar Tree operates over 3,000 retail locations across the continental United States including approximately 220 stores in California. See Declaration of Paula Brady at ¶ 3.

Each retail location has a Store Manager who is responsible for running the store, including without limitation, scheduling employees, reviewing and approving payroll, maintaining accurate business records, supervising the store employees and ensuring compliance with all applicable laws and regulations. The Assistant Managers perform some of the Store Manager's duties when the Store Manager is not in the store. One such duty is ensuring all employees correctly record all time worked and make necessary corrections to employee time records to capture accurately all time worked. Depending upon the size of the retail store, there may be two, three or more Assistant Managers all of whom are classified as non-exempt hourly employees who assist in

1 supervising the non-manager hourly employees. Some Assistant Managers are
2 employed full-time while others are part-time. The vast majority of the non-manager
3 hourly employees ("Hourly employees") work a part-time schedule of fewer than five
4 hours per day. See Declaration of David McDearmon at ¶¶ 3-5.

5 Dollar Tree also employs District Managers who oversee the operation of
6 the approximately 10-12 stores that comprise a district. *Id.* at ¶ 6. Currently, there are
7 24 districts in California. *Id.* The District Manager is responsible for ensuring the stores
8 in his or her district comply with Dollar Tree's policies and are productive stores. *Id.* The
9 District Manager is the Store Manager's primary connection to Dollar Tree. *Id.* Each
10 district in California is part of one of three regions that encompass California. Each
11 region is headed by a Regional Director. *Id.* The different regions also have their own
12 regional training and human resources personnel. *Id.*

13 Plaintiffs worked at a single Dollar Tree store in Rohnert Park, California
14 during a combined timeframe from October 2005 through February 2007. Compl. at ¶¶
15 12-15. Their time keeping records were entered and adjusted at that one store.
16 Therefore, any alleged wrongful conduct with regard to their time records occurred only
17 at store 1868. Upon this localized conduct, Plaintiffs cannot support a state-wide claim
18 against Dollar Tree. Dollar Tree employed thousands of employees at hundreds of
19 different stores, who worked in different regions, with different Regional Directors,
20 different District Managers, under different Store Managers and Assistant Managers and
21 under different daily circumstances throughout the class period. Therefore, there is no
22 common proof. Importantly, the only witnesses identified by Plaintiffs besides
23 themselves, Miguel Cruz and John Hansen, both former Dollar Tree Store Managers,
24 testified: 1. many of the changes they made to employee time records were proper; and
25 2. they could not identify from the records which changes were proper and which were
26 not. True and correct copies of the Deposition of John Hansen ("Hansen Dep.") 635:9-
27 23 and the Deposition of Miguel ("Cruz Dep.") 454:1-15 are attached as Exhibit D and E
28 to the Declaration of Beth Hirsch Berman, respectively. Evidence suggesting that two

1 Store Managers in the same district altered time entries in direct contravention of
2 company policy will not prove that it happened in any other store. In fact, the employee
3 time records shows the opposite. A review of employee time records throughout the
4 state of California reveals that employee time records were not systematically adjusted
5 so as to reduce the number of hours worked in any given day or pay period. See
6 Declaration of Robert Crandall at ¶ 3, Ex. 1. Indeed, the only common policy and
7 practice across the proposed class is Dollar Tree's policy that time worked is to be
8 properly recorded by all hourly employees and that they are to be paid for all time
9 worked.

10 The proposed class is also not appropriate for certification because the
11 interests of the Assistant Managers clash with those of the Hourly employees under their
12 supervision. Assistant Managers are responsible (along with Store Managers) for
13 reviewing time records and ensuring their accuracy. McDearmon Decl. at ¶ 9. If time is
14 not entered correctly, either through a mistake on the part of the Hourly employees or
15 because of computer system glitches, an Assistant Manager may enter and correct time
16 for the Hourly employees. Hourly employees may not enter time for anyone but
17 themselves and may not adjust their time records or those of anyone else. The
18 antagonisms between these two groups go to the heart of the liability issues regarding
19 whether Hourly employees had their time improperly adjusted to deny them pay. Since
20 Plaintiffs and other Assistant Managers were charged with the responsibility of ensuring
21 the accuracy of Hourly employees' time records, they cannot adequately represent a
22 class of Hourly employees who allege they lost wages as a result of Dollar Trees failure
23 to maintain accurate time records.

24 Additionally, neither Baas nor Lofquist can adequately represent the
25 proposed class. Counsel for Baas and Lofquist also represents John Hansen ("Hansen")
26 in a misclassification wage and hour lawsuit against Dollar Tree pending before this
27 Court. Hansen is the very same Store Manager they accuse of manipulating their time
28 records. Already, Plaintiffs have given testimony under oath that conflicts with testimony

provided by Hansen and his co-Plaintiff, Miguel Cruz ("Cruz"). This is a clear conflict of interest that prohibits Baas and Lofquist from representing the class.

II. STATEMENT OF FACTS

A. Dollar Tree's Payroll Policies.

Dollar Tree's written payroll and wage policies comply with California's statutory requirements as well as the Fair Labor Standards Act. Dollar Tree's policy is to pay overtime wages (one and one-half times the regular rate of pay) to all exempt employees who work in excess of eight hours in a single day or forty hours in a week.¹ In addition, Dollar Tree pays double time for work in excess of twelve hours in a day or more than eight hours on an employee's seventh consecutive day of work. Dollar Tree requires its employees to record accurately the hours they work, including the actual time taken for their meal breaks. Dollar Tree's employee handbook states:

Federal Law and Dollar Tree's policies require all hourly paid associates to be paid in full for all time worked. This includes time spent performing administrative or other functions, preparing company reports or any other work or services performed for the company.

Associates who do not record all the time worked or who otherwise violate this time clock policy are subject to corrective action which may include termination of both the associate working the hours and the person(s) responsible for letting it occur. It is recommended that you count your own time worked at the end of the workweek to the nearest quarter hour and make a note of it for your personal records.

Check your pay stubs to be sure you are paid for all time worked. If there is any question about your pay, notify your supervisor and s/he will make any adjustments. Mistakes may occasionally occur, so we ask that you bring them to the attention of your supervisor as soon as they are discovered.

We appreciate your hard work and loyalty to Dollar Tree and we want to pay you for every minute of it.

Brady Decl. at ¶ 7, Ex. B.

Store Managers and Assistant Managers were trained in these policies, and were required to communicate these policies to all store Hourly employees. See

¹ See Brady Decl. at ¶ 7, Ex. B.

1 McDearmon Decl. at ¶¶ 7-9. Dollar Tree's Store Managers and Assistant Managers,
 2 including Baas and Lofquist, were expected to comply fully with these policies. *Id.* The
 3 applicable Wage Orders are also posted in each Dollar Tree retail store for all
 4 employees to read. See McDearmon Decl. at ¶ 13.

5 To comply with the foregoing policy, all hourly employees are issued
 6 unique employee numbers and access codes that allow them to enter the times that their
 7 shifts and rest and meal breaks start and end. See Declaration of Steve Pearson at ¶ 5.
 8 Time may be entered both at the cash register terminals on the sales floor and on a
 9 computer kept in the store's office. *Id.* All are connected to a time tracking system
 10 known as Compass.² *Id.* at ¶ 4. It is Dollar Tree policy that all hourly employees are to
 11 use Compass to record every start and end of shift, and all breaks. See Brady Decl. at
 12 ¶¶ 7 and 8, Exs. B and C. Since employees sometimes neglect to clock in or out and
 13 occasionally the system malfunctions, management level employees (Assistant
 14 Managers and above) are able to adjust the time records for any employee in their store
 15 other than themselves. See Pearson Decl. at ¶ 6. For example, management
 16 employees are to manually correct or enter any part of a shift an employee has failed to
 17 record accurately whether through a mistake on the employee's part or because of a
 18 problem with the Compass system at the time the employee should have recorded time.
 19 When any correction is made, Compass maintains a footprint of the original entry,
 20 identifies the correction, identifies who made the correction and the date and time the
 21 correction was made. *Id.* at ¶ 8. Dollar Tree can generate punch audit reports from
 22 Compass which show each of the foregoing trails. *Id.* Dollar Tree has used punch audit
 23 reports to conduct investigations when it has received allegations of inaccurate time
 24 records. When it has determined that time records were falsified (or employees worked

25
 26
 27 ² Dollar Tree began using Compass to track employee time on or about June, 2006. Prior to
 28 that, Dollar Tree used a time keeping system called Fastech. Fastech operated in a similar
 manner to Compass but it did not provide as detailed punch tracking information as Compass
 does. See Pearson Decl. at ¶ 9.

off the clock), in accordance with its policy, Dollar Tree has terminated the management employees who engaged in the improper conduct. See McDearmon Decl. at ¶ 12.

Dollar Tree policy also requires that each employee sign a weekly Payroll Summary Report, attesting to the accuracy of the time for which s/he is being paid. *Id.* at ¶ 11. Moreover, employees are not permitted to punch time using another employee's access code. The purpose of the individual codes is to prevent timecard fraud and to enhance the accuracy of the timekeeping records. See Pearson Decl. at ¶¶ 5 and 7.

B. Statistical Data from Punch Audit Reports.

Plaintiffs have asserted that they intend to rely on Dollar Tree's electronic time keeping records to establish their case. Berman Decl. at ¶ 3, Ex. A. Those records, referred to as punch audit reports, are retrievable by store, and for each hourly employee identify when a punch was made, the type of punch, i.e., start shift, start break, end shift, etc. and by whom the punch was made. If a time entry was changed, then more than one punch will appear for the same type of entry (i.e. two entries for a start shift). Each entry will have a trail as to the time and date when it was made and by whom. The punch audit reports do not identify why a change was made. As a result, it is impossible to discern from them whether a change was made to correct an error or if it was made in contravention of Dollar Tree policy. Hansen Dep. 635:9-23; Cruz Dep. 454:1-15. The Plaintiffs have no evidence, either records created concurrently or even belatedly, that identify the purpose of the changes recorded on the punch audit reports.

Plaintiffs allege that Dollar Tree made adjustments to reduce overall payroll hours. Yet for the entire putative class, less than one percent of employee days had time adjusted so as to result in a net loss of time. Crandall Decl. at ¶ 3. Thus, even if all adjustments which led to a loss of time were improper, (which they were not) such adjustments would affect fewer than one percent of the employee days. The Fastech data shows that sixty-five percent of all employees had no days where an edit resulted in a reduction in hours. *Id.* at ¶ 17. Of the thirty-five percent who had edits that resulted in a loss, the frequency of negatively edited days does not reach 1% until the 80th

1 percentile. *Id.* The Compass data shows that seventy percent of employees had no edit
2 reductions to his or her time records. *Id.* at ¶ 18. Of that thirty percent that did, the
3 typical employee did not have negative edits that exceeded 1% until the 86th percentile.
4 *Id.* at ¶ 18. The mean for edits resulting in a loss of time is less than one percent of all
5 employee days. *Id.* at ¶ 17. Such records demonstrate not only that Dollar Tree did not
6 improperly alter time records but also that Plaintiffs' claims, if true, are neither typical or
7 common.³

8 Second the Plaintiffs allege that Dollar Tree made adjustments to subtract
9 time worked to avoid payment of overtime wages. In the Fastech data, only eighteen
10 percent of the negative edits caused an eight-plus hour day to become a day of eight
11 hours or less. Crandall Decl. at ¶ 25. This means that only 0.12 percent of employee
12 days were adjusted to less than eight hours. *Id.* In the Compass data, only twenty
13 percent of the negative edits caused an eight-plus hour day to become a day of eight
14 hours or less. *Id.* Thus, negative overtime adjustments affected fewer than 0.08 percent
15 of the employee days. *Id.*

16 Lastly, the Plaintiffs allege that Dollar Tree made adjustments to subtract
17 time worked to fewer than five hours to deprive employees of an entitlement to meal
18 periods. In the Fastech data only twelve percent of the negative edits adjusted an
19 employee's time below five hours. *Id.* This means only 0.08 percent of employee days
20 were adjusted to less than five hours. *Id.* Under the Compass data, only seven percent
21 of the negative edits resulted in an employee's time falling below five hours. *Id.* Thus,
22 only 0.02 percent of employee days were edited to reduce an employee's time to under
23 five hours. *Id.*

24 The statistics clearly show that there is no state-wide policy to deprive
25 employees of time worked for any reason. Of the less than one percent of employee
26 days edited, seventy percent of the edits have no effect on either entitlements to meal

27
28 ³ Additionally, not all time edits are negative. Adjustments that actually added time to the
employee's punches were more common. Crandall Decl. at ¶ 3, Ex. A.

breaks or overtime wages. *Id.* Moreover, the number of employees whose time was negatively adjusted, for whatever reason, is so small that there is no commonality across the proposed class.

Even when reviewing the punch audit reports for stores in the same district as 1868, there is no pattern of adjusting time records downward, as the data demonstrates. See Declaration of Charlotta Jacobson-Allen at ¶¶ 3-5, 8, Ex. C. Indeed, some stores in the same district as the Plaintiffs' store had no corrections to employee's time, while others had corrections, but none that would affect overtime compensation, or if affected, so infrequently and in such small quantities that no improper purpose could be inferred. *Id.* at ¶¶ 4-6, Ex. A. Moreover, the evidence shows that Dollar Tree paid overtime to employees when worked. Dollar Tree did not discipline the Store Managers for incurring overtime. See Brady Decl. at ¶ 9.

C. Plaintiff Kassondra Baas' Employment at Dollar Tree Stores, Inc.

Dollar Tree hired Baas ("Baas") as an hourly associate in October 2005. She was promoted to Assistant Manager on April 5, 2006. *Id.* at 4. Store Manager John Hansen terminated Baas on January 26, 2007, for multiple instances of failing to follow company policies and procedures. See Hansen Dep. 23:3-6; 25:25-26:22. As an Assistant Manager, Baas was not only trained in Dollar Tree's policies and procedures but also was responsible for enforcing them with respect to Hourly employees working under her supervision.

In reviewing punch audit reports for the time period covering Baas' tenure, Dollar Tree has identified eleven instances where Baas' time records were manually adjusted in a way that would affect overtime. See Jacobson-Allen Decl. at ¶¶ 4-5, 7 Ex. B. While there is no evidence that these manual adjustments were improper, the manual adjustments resulted in a reduction of a total of only 1.48 hours in overtime of which 42 minutes were paid at the regular rate of pay. In contrast, Baas was paid for 14.29 hours of overtime during her time with Dollar Tree. See Brady Decl. at ¶ 6, Ex. A.

1 **D. Plaintiff Kelly Lofquist's Employment at Dollar Tree Stores, Inc.**

2 Dollar Tree hired Lofquist as an hourly associate in August 2006. *Id.* at ¶
 3 5. She was promoted to Assistant Manager on October 1, 2006. *Id.* As an Assistant
 4 Manager, she was trained in Dollar Tree's policies and procedures and had responsibility
 5 for enforcing those policies with respect to Hourly employees working under her
 6 supervision. Store Manager John Hansen terminated Lofquist on February 12, 2007, for
 7 unacceptable work performance which included repeated failures to report to work on
 8 time. See Hansen Dep. 218:16-219:4.

9 After reviewing the punch audit reports for the time period covering
 10 Lofquist's tenure, Dollar Tree has identified one instance where Lofquist's time records
 11 were adjusted resulting in a reduction of .68 hours in overtime.⁴ See Jacobson-Allen
 12 Decl at ¶¶ 3-5, 8, Ex. C. Again, there is no evidence that this adjustment was improper.
 13 Dollar Tree's records also disclose that it paid Lofquist for 1.82 hours at the overtime rate
 14 and 13.82 hours at the double time rate during her tenure. See Brady Decl. at ¶ 6, Ex. A.

15 **III. ARGUMENT**

16 **A. Plaintiffs Will Be Unable To Prove The Necessary Pre-Requisites For**
 17 **This Action To Be Certified As A Class Action.**

18 "In determining the propriety of a class action, the question is not whether
 19 the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but
 20 rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417
 21 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l.*, 452 F.2d 424 (5th Cir. 1971))
 22 (internal quotation marks omitted). A class action may be certified only if "(1) the class is
 23 so numerous that joinder of all members is impracticable; (2) there are questions of law
 24 and fact common to the class; (3) the claims or defenses of the representative parties
 25 are typical of the claims or defenses of the class; and (4) the representative parties will
 26 fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). In addition

27 ⁴ During her deposition, Lofquist also alleged she worked off the clock stocking during the third
 28 shift. That allegation was denied by her Store Manger, John Hansen. Hansen Dep. 547:23-
 548:16.

1 to satisfying these prerequisites, parties seeking class certification must show that the
 2 action is maintainable under Rule 23(b)(1), (2) or (3). See Rule 23(b); *Amchem*
 3 *Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b)(3) permits class actions
 4 when “the court finds that the questions of law or fact common to the members of the
 5 class predominate over any questions affecting only individual members, and that a
 6 class action is superior to other available methods for the fair and efficient adjudication of
 7 the controversy.” Fed.R.Civ.P. 23(b)(3).

8 The party seeking class certification bears the burden of establishing that
 9 the requirements of both Rules 23(a) and 23(b) have been met. See *Zinser v. Accufix*
 10 *Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001), amended by 273 F.3d 1266
 11 (9th Cir. 2001); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The
 12 merits of the class members' substantive claims are generally irrelevant to this inquiry.
 13 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Moore v. Hughes*
 14 *Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983). However, courts are “at liberty to
 15 consider evidence which goes to the requirements of Rule 23 even though the evidence
 16 may also relate to the underlying merits of the case,” and a court may only certify a class
 17 after a “rigorous analysis” as to whether the requirements have been satisfied. *Hanon*,
 18 976 F.2d at 509 (internal quotations omitted). In this case, Plaintiffs will be unable to
 19 establish the pre-requisites for class certification for the reasons set forth below.

20 **B. Plaintiffs Do Not Satisfy the Requirements of Rule 23(a).**

21 Under Rule 23(a), the party seeking class certification must establish: (1)
 22 that the class is so large that joinder of all members is impracticable (i.e., numerosity);
 23 (2) that there are one or more questions of law or fact common to the class (i.e.,
 24 commonality); (3) that the named parties' claims are typical of the class (i.e., typicality);
 25 and (4) that the class representatives will fairly and adequately protect the interests of
 26 other members of the class (i.e., adequacy of representation). See Fed.R.Civ.P. 23(a).

1 **1. The Proposed Class Is Numerous.**

2 Dollar Tree does not dispute that the proposed class satisfies the
3 numerosity requirement.

4 **2. There Is No Commonality Among The Proposed Class**
5 **Members.**

6 The requirement of commonality "seek[s] to assure that the action can be
7 practically and efficiently maintained [as a class action]." *Baby Neal v. Casey*, 43 F.3d
8 48, 56 (3d Cir. 1994). Commonality focuses on the relationship of common facts and
9 legal issues among class members. "Class treatment makes no sense if there are no
10 common issues; the trial court would gain nothing but logistical headaches from the
11 combination of the cases for trial." *Id.* at 55.

12 To demonstrate commonality, plaintiffs must show at least one significant
13 issue of fact or theory of law common to the entire class. *See Hanlon v. Chrysler Corp.*,
14 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs have argued that all the employees in the
15 putative class are subject to the same policies and procedures, namely Dollar Tree uses
16 the same Compass timekeeping system to deprive employees of regular pay and
17 overtime. See Transcript of Proceedings held on August 24, 2007, 4:21-25, attached to
18 Request for Judicial Notice. However, Plaintiffs base their case on the allegations
19 arising from the one store in which they worked and the testimony of one other Store
20 Manager in the same district. Plaintiffs have failed to produce any evidence that Dollar
21 Tree's policies or procedures are improper. Plaintiffs have produced no evidence,
22 credible or otherwise, to support their allegation that time records were altered
23 improperly in any store other than stores 1868 and 2262. In fact, the evidence is to the
24 contrary. Fewer than 1% of all hourly employee days were edited to have time
25 reduced.⁵ Crandall Decl. at ¶ 3, Ex. A. Stated another way, on any given day, more
26 than 99% of Dollar Tree's hourly employees in California had no negative adjustment to

27 _____
28 ⁵ This number reflects all edits that reduced the amount of time worked without regard to the
reason for the edit.

1 their time. Consequently, Plaintiffs can point to no common fact to support their claim
2 that Dollar Tree improperly altered time clock records to reduce payroll.

3 The only other supposed common fact to which Plaintiffs point is that
4 Hansen, their Store Manager, who was allegedly altering time and depriving them of pay,
5 told them that District Manager Tellstrom told him to do it. A true and correct copy of the
6 Deposition of Kelly Lofquist ("Lofquist Dep.") 257:10-13 is attached as ¶ 8, Exhibit F to
7 the Declaration of Beth Hirsch Berman. Yet, that Store Manager, Hansen, denied that
8 Tellstrom told him to alter time records. Hansen Dep. 273:23-274:2. At their
9 depositions, Plaintiffs admitted that they never heard Tellstrom instruct Hansen to alter
10 their time. A true and correct copy of the Deposition of Kassondra Baas ("Baas Dep.")
11 Baas Dep. 79:12-22 is attached as ¶ 9, Exhibit G to the Declaration of Beth Hirsch
12 Berman. Lofquist Dep. 257:3-13; 260:18-21. As noted, Hansen testified it was basically
13 his own decision to change time, and "he could not recall" whether Tellstrom had so
14 instructed him (surely a recollection he would have if such occurred) and that he knew it
15 was wrong and against Dollar Tree policy to change time records to deduct from time
16 actually worked. Hansen Dep. 273:23-274:2. Ironically, Cruz (who was not in a position
17 to alter Plaintiffs' time) testified that Tellstrom had instructed him to engage in such
18 alterations. Cruz Dep. 64:20-65:4. Cruz's testimony is patently false on many levels.⁶
19 Despite his claims otherwise, the punch audit reports simply do not show he engaged in
20 significant time alterations that deprived employees of pay. Cruz Dep. 94:3-10; 96:1-9;
21 253:24-254:25. Even if Plaintiffs' and Cruz's testimony were taken as true for purposes
22 of this motion, at most Plaintiffs would have established a fact common to two stores.
23 They have presented no evidence to point to similar activity in the more than 200 other
24 Dollar Tree stores in California.

25 If Plaintiffs' are correct that Dollar Tree's Compass system enabled
26 management on a state-wide basis to reduce employee time to deprive them of time

27 ⁶ Mr. Cruz testified that he went into Compass and changed the records so as to deprive all
28 employees in his store of overtime wages. Cruz Dep. 70:13-20. However, a review of the punch
audit reports for his store shows that this is not true. Cruz Dep. 94:3-10; 96:1-9; 253:24-254:25

1 worked, then there should be state-wide evidence of time adjustments reducing the
2 amount of time that employees worked. In fact, the extremely low number of time
3 corrections state-wide suggests the opposite – Dollar Tree’s use of the Compass system
4 is remarkably accurate in properly recording and capturing all time worked. As shown
5 above, for the entire putative class, less than 0.7 percent of employees’ days had time
6 adjusted negatively. Crandall Decl. at ¶ 10. The fact that less than 0.7 percent of
7 employee days time entries were altered does not suggest that Dollar Tree has a policy
8 of depriving its employees of payment for all time worked. The median employee had
9 his or her time adjusted zero percent of the time. *Id.* at ¶¶ 17, 18. In other words, the
10 “most common” employee has experienced no negative time adjustments. *Id.* at ¶ 19. It
11 strains reason to certify a class of thousands when only 0.7 percent of employee days
12 were negatively adjusted.

13 Moreover, a single finding of improper alterations will not be applicable
14 class wide. There are many proper reasons for manual adjustments to time. Hansen
15 Dep. 274:11-27:5. It is not possible to tell from Compass (or Fastech) alone the reason
16 time was adjusted. Each time adjustment will have to be examined. See, e.g., Hansen
17 Dep. 286:15-287:21. If each time alteration will have to be examined, the fact the time
18 entry was adjusted does nothing to establish commonality across the putative class.
19 *Castle v. Wells Fargo Financial, Inc.*, Case 3:06-cv-04347-SI 2008 WL 495705 (N.D.Ca.
20 Feb. 20, 2008). (“The variety of different circumstances under which the declarants were
21 allegedly required to work unpaid overtime also weighs against certification. Resolution
22 of plaintiffs’ claims would require individualized determinations, and would necessitate
23 testimony from individual employees and their supervisors about the schedules actually
24 worked and whether managers were aware of the overtime hours worked. Plaintiffs’
25 claims of altered time cards would similarly require class member-specific testimony and
26 evidence regarding the circumstances surrounding the alterations, and defendant would
27 be entitled to show that any alterations were made for legitimate reasons, which could
28 differ for each class member.”)

Other courts have denied certification in similar cases, finding that individual issues predominate such that the employees are not similarly-situated. Judge Illston recently came to a similar conclusion in *Castle v. Wells Fargo Financial, Inc.*, Case 3:06-cv-04347-SI 2008 WL 495705 (N.D.Ca. Feb. 20, 2008). The *Castle* plaintiffs sought to certify a nationwide class of Wells Fargo employees based upon the allegation that Wells Fargo utilized a timekeeping system which allowed management to deprive the hourly employees of overtime compensation by manipulating time records. The plaintiffs submitted declarations from individual employees all stating that they were not paid for some amount of overtime worked, and that they were pressured by their managers not to record overtime hours. The court found that if the declarants were able to prove the facts in their declarations, they would have strong individual claims; “[h]owever, the Court finds that plaintiffs have not identified any company-wide policy or practice to deny overtime and thus have failed to show that the various Wells Fargo employees are similarly situated for purposes of class certification... At the most, plaintiffs’ evidence suggests differing ‘policies’ or practices depending on the branch or the district, rather than on a nationwide basis.” *Id.* at p. 5; *See, e.g., Cornn v. United Parcel Service, Inc.*, No. C03-2001 TEH, 2005 WL 2072091, *5 (N.D.Cal. Aug. 26, 2005) (“Because the Court cannot determine whether a driver performed work during the interval in question without undertaking individualized inquiries that predominate over any common questions, class certification would be inappropriate.”); *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 469 (S.D. Cal. 2007) (Denying certification under Rule 23 based on plaintiff’s allegations of improper deductions from wages because the actions of each individual manager would have to be examined; improper deductions could not be gleaned from running a report.); *Basco v. Wal-Mart Stores, Inc.*, No. 00-3184, 2004 WL 1497709, *7 (E.D.La. July 2, 2004) (denying certification stating that “...plaintiffs seek to make a corporate policy to keep employee wage costs low sufficient proof to justify the creation of a class of all Wal-Mart employees that have not been properly paid overtime in the last three years. It is obvious from the discovery presented

that this “policy” and its effects are neither homogeneous nor lend themselves to collective inquiry. The effects of the policy as alleged are anecdotal, that is to say particularized.”) *Simmons v. T-Mobile USA, Inc.*, No. H-06-1820, 2007 WL 21008, 6 (S.D. Tex. Jan. 24, 2007) (denying certification because “this is a case involving claims of ‘off the clock’ unpaid overtime, where allegedly dozens (if not hundreds) of different low-level supervisors with wide management discretion in practice violate Defendant’s clear, lawful written policies at some or many of Defendant’s more than one hundred different retail locations.”); see also *Lawrence v. Philadelphia*, No:03-CV-4009, 2004 WL 945139, *2 (E.D Pa. Apr. 29, 2004).

Plaintiffs worked at only one Dollar Tree store in Rohnert Park, California during a combined timeframe of October 2005 through February 2007. Compl., ¶¶ 13 and 15. Crediting fully Plaintiffs’ allegations and those of their witnesses – Hansen and Cruz, it is apparent that, at most, they have information about what two store managers did in a single district. Upon this localized observation, they cannot support a state-wide claim against Dollar Tree. Plaintiffs’ have set forth no common set of facts applicable to every hourly employee to establish class wide liability. The only common fact is that Dollar Tree has a written and enforced policy against time shaving. Certifying a class of thousands when time alterations occur to less than one percent of the employees will create the logistical headaches the commonality requirement was designed to prevent.

3. Plaintiffs’ Claims Are Not Typical Of The Proposed Class Of Hourly Employees.

The claims of Plaintiffs must be typical of the claims of the class. To be considered typical for purposes of class certification, the claims of the putative class must be “fairly encompassed by the named plaintiff’s claims.” *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation omitted). The commonality and typicality requirements are similar and tend to merge. *Id.* at 157 n. 13. “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether

1 other class members have been injured by the same course of conduct." *Hanon v.*
 2 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and quotation omitted).
 3 Plaintiffs are unable to prove that their claims are "typical" of the classes of hourly
 4 employees they seek to represent.

5 First, as indicated above, Plaintiffs, both Assistant Managers worked at a
 6 single Dollar Tree store in Rohnert Park, California during a combined timeframe of
 7 October 2005 through February 2007. Compl., ¶¶ 13 and 15. They imply a single
 8 person, their District Manager, Mr. Tellstrom, as having allegedly directed the improper
 9 alterations. They concede that they presently do not have any facts regarding anyone
 10 other than Mr. Tellstrom. See RJN Exh. A, 4:15-5:3; 7:16-20. Moreover, the Plaintiffs'
 11 Store Manager cannot remember if Mr. Tellsrom actually told him to improperly adjust
 12 employees time. Hansen Dep. 273:23-274:2. In fact, Mr. Hansen states he knew the
 13 improper alterations were contrary to Dollar Tree policy. *Id.* 648:13 – 17. Thus, there is
 14 absolutely no evidence that the Plaintiffs' claims of shaving are "typical" of the hourly
 15 employees in other stores or districts.

16 Not only have Plaintiffs failed to provide any evidence that their claims are
 17 typical, the evidence shows exactly the opposite. Baas' time entries were adjusted
 18 fourteen percent of the time. Crandall Decl. at ¶ 21. This is considerably higher than the
 19 frequency of edits found across the entire proposed class. *Id.* The mean frequency of
 20 adjustments using the Fastech data was 0.6 percent and for the Compass data was 0.4
 21 percent with the median for both being zero. *Id.* at ¶¶ 17-18. In other words, Baas' time
 22 was adjusted, for whatever reason, fifteen times more frequently than the average
 23 employee. Baas is at or above the 95th percentile in frequency of edits. *Id.* at ¶ 21.
 24 Even within her own store she is an anomaly. Baas had her time edited with more
 25 frequency than any other employee in her store, ranking number one out of more than
 26 forty employees. *Id.* at ¶ 22. Based on the statistics alone, Baas' claims are not typical
 27 of the class.

1 While not as stark as Baas, the frequency of adjustment to Lofquist's time
2 exceeds that of the average employee. *Id.* at ¶ 23.

3 **4. The Plaintiffs Do Not Fairly And Adequately Protect The**
4 **Interests Of Other Members Of The Class.**

5 Rule 23(a)(4) dictates that the representative plaintiff must fairly and
6 adequately protect the interests of the class. To satisfy constitutional due process
7 concerns, unnamed class members must be afforded adequate representation before
8 entry of a judgment which binds them. *See Hanlon*, 150 F.3d at 1020 (citing *Hansberry*
9 *v. Lee*, 311 U.S. 32, 42-43 (1940)). "Absent class members must be afforded adequate
10 representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020
(citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, (1940)).

11 **a. The Plaintiffs' Counsel Is In Conflict With The Class.**

12 For the representative Plaintiffs' counsel to meet the adequacy
13 requirement, the counsel must not have any conflicts of interest with other class
14 members and must be able to prosecute the action vigorously on behalf of the class.
15 *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). "[W]here there
16 is reason to doubt the loyalty of counsel or the adequacy of counsel's representation,
17 serious questions arise concerning the preclusive effect of any resulting judgment." *Cal-*
18 *Pak Delivery, Inc. v. United Parcel Serv.*, 52 Cal.App.4th 1, 11-12 (1997). Plaintiffs'
19 counsel, The Edgar Law Firm, currently represents Hansen and Miguel Cruz in a
20 misclassification wage and hour lawsuit pending against Dollar Tree in this Court.
21 Hansen is the Store Manager whom Plaintiffs allege improperly altered their time
22 records. Hansen is also responsible for terminating Plaintiffs' employment with Dollar
23 Tree. During her deposition, Lofquist alleged she worked off the clock stocking, in the
24 presence of and at the direction of Hansen. Lofquist Dep. 247:4-248:17. That allegation
25 was denied by Hansen. Hansen Dep. 547:23-548:16. Moreover, Hansen testified in his
26 deposition that he knew it was against Dollar Tree policy to alter time records to reflect
27 less time than an employee actually worked. Hansen Dep. 648:13-17.

1 Plaintiffs' allegation that Hansen violated the law is in conflict with
 2 Hansen's interests and deposition testimony. The heart of Plaintiffs' allegations is that
 3 Dollar Tree has a policy of using the Compass system to deny overtime. Hansen
 4 explicitly denies this allegation. Plaintiffs' allegations are clearly prejudicial to the
 5 interests of Hansen. In a class action context, "class counsel are subject to a
 6 'heightened standard' which they must meet if they are to be allowed by the Court to
 7 represent absent class members." *Huston v. Imperial Credit Commercial Mortgage*
 8 *Invest. Corp.*, 179 F.Supp.2d 1157, 1167 (C.D.Cal. 2001). The Edgar Law Firm's
 9 representation of both Hansen and Plaintiffs is a clear conflict of interest.

10 The District Court for the Northern District of California follows California
 11 ethical standards. *In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000); Civil
 12 Local Rule 11-4(a)(1). The applicable standard of conduct is set forth in Rules of
 13 Professional Conduct of the State Bar of California, Rule 3-310(c)(3), which provides as
 14 follows:

15 A member shall not, without the informed written consent of
 16 each client ... [r]epresent a client in a matter and at the same
 17 time in a separate matter accept as a client a person or entity
 whose interest in the first matter is adverse to the client in the
 first matter.

18 *Id.* "A conflict of interest exists when a lawyer's duty on behalf of one client obligates the
 19 lawyer to take action prejudicial to the interests of another client..." *Moreno v. Autozone,*
 20 *Inc.*, 2007 WL 4287517, *5 (N.D.Cal. Dec 6, 2007). "An 'adverse' interest is one that is
 21 'hostile, opposed, antagonistic ... detrimental, unfavorable' to one's own interests." *Id.*
 22 (quoting *Ames v. State Bar*, 8 Cal.3d 910, 917 (1973)).

23 The Edgar Law Firm cannot sweep the conflict under the rug by obtaining
 24 waivers from just the named plaintiffs.⁷ Waivers would have to be obtained from every
 25 class member. See *Moreno v. Autozone, Inc.*, 2007 WL 4287517, "*7. "As a practical
 26 matter, [Plaintiff's law firm] can not obtain written waiver of the actual conflicts of interest

27 _____
 28 ⁷ Dollar Tree has asked for, but Plaintiffs have failed to provide copies of the alleged waivers
 received from them. See Berman Decl. at ¶¶ 4 and 5, Ex. A.

1 that exist from the absent class members.” *Id.* “Absent each client’s informed written
 2 consent, dual representation of clients whose interests actually conflict is prohibited and
 3 results in “per se or automatic” disqualification.” *Moreno v. Autozone, Inc.*, 2007 WL
 4 4287517, *6 (citing *Flatt v. Sup.Ct.*, 9 Cal.4th 275, 284 (1994)). “Moreover, under the
 5 “hot potato rule”, dual representation conflicts cannot be cured by the expedient of
 6 severing the relationship with one of the clients.” *Id.* (citing *Flatt v. Sup.Ct.*, 9 Cal.4th
 7 275, 288 (1994); *Truck Ins. Exchange v. Fireman’s Fund Ins. Co.*, 6 Cal.App.4th 1050,
 8 1056 (1992).

9 The Edgar Law Firm cannot represent both Plaintiffs and Hansen.
 10 Certainly, the conflict precludes The Edgar Law Firm from vigorously representing the
 11 interests of the absent class members. Therefore, Plaintiffs’ counsel fails to meet the
 12 requirements of Rule 23(a)(4). See *Hanlon*, 150 F.3d at 1020.

13 **b. The Plaintiffs’ Interests Are In Conflict With The Class.**

14 “Adequate representation ‘depends on the qualifications of counsel for the
 15 representatives, an absence of antagonism, a sharing of interests between
 16 representatives and absentees, and the unlikelihood that the suit is collusive.’” *Crawford*
 17 *v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) (quoting *Brown v. Ticor Title Ins. Co.*, 982
 18 F.2d 386, 390 (9th Cir. 1992)). Plaintiffs will not be able to fulfill this obligation because
 19 their interests are antagonistic to the interests of the class members they seek to
 20 represent. Plaintiffs, former Assistant Managers, had a duty to make sure the time
 21 records accurately captured all time worked by employees.

22 Plaintiffs, as Assistant Managers, were and are responsible for enforcing
 23 Dollar Tree’s policies, particularly when the Store Manager is not present. Because
 24 Plaintiffs’ and other Assistant Managers were charged with the responsibility of ensuring
 25 accurate time records were kept, they cannot adequately represent a class of Hourly
 26 employees who allege tampering with their time records, particularly where the putative
 27 representatives may have done the tampering. Plaintiffs knew it was against Dollar Tree
 28 policy to shave time; yet neither complained when the Store Manager allegedly took time

1 away from them and others. Baas Dep. 81:25-82:2; Lofquist Dep. 60:15-17.⁸ Indeed,
 2 both Plaintiffs were aware of Dollar Tree's Careline whereby employees can
 3 anonymously alert Dollar Tree to violations of the law or policy. Baas Dep. 74:5-9;
 4 Lofquist Dep. 60:5-8. Neither Plaintiff contacted the Careline or any other person to
 5 voice their concerns. Baas Dep. 74:2-4; Lofquist Dep. 60:15-17; 214:9-13. Baas
 6 certainly knew what to do if her pay was incorrect; as she had previously contacted
 7 Candace Camp from Dollar Tree's regional human resources office when she was not
 8 getting paid an Assistant Manager's rate after her promotion. Baas Dep. 59:19-60:7.
 9 Both Plaintiffs knew how to alert Dollar Tree to problems, yet chose not to do so.

10 Because both Bass and Lofquist were involved in the alleged wrongful
 11 acts, their claims are not typical of the employees who may have been unwittingly
 12 harmed. See *Hanon*, 976 F.2d at 508 ("[A] named plaintiff's motion for class certification
 13 should not be granted if there is a danger that the absent class members will suffer if
 14 their representative is preoccupied with defenses unique to it."). "Where there is a
 15 conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of
 16 representative status. Thus a finding of adequate representation will not be appropriate
 17 if the proposed class representative's interests are antagonistic to the remainder of the
 18 class." *Global Minerals & Metals Corporation v. Superior Court*, 113 Cal.App.4th 836,
 19 851 (2003); *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 478-479 (1981).

20 The court in *Van Allen v. Circle K Corp.*, 58 F.R.D. 562, 564 (C.D.Cal.
 21 1972), reached a similar conclusion, holding that the interests of former independent
 22 operators, who would be interested only in the fullest possible financial recovery, were
 23 adverse to current operators who wished to keep working with a financially robust
 24 defendant with a favorable public image.

25
 26
 27
 28 ⁸ Lofquist testified that she saw Hansen taking time away from a cashier named Tina. See
 Lofquist Dep. 40:21-41:12.

c. **Plaintiffs Do Not Satisfy The Requirements Of Rule 23(b).**

Class certification pursuant to Rule 23(b)(3) requires the plaintiff to establish that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." It is unclear under which subsection the Plaintiffs' are seeking certification. Therefore each is discussed in turn.

5. **Adjudication Of The Plaintiffs' Claims Would Not Does Not Create An Incompatible Standard Of Conduct Or Alter The Claims Of Other Parties.**

"Rule 23(b)(1)(A) authorizes class actions to eliminate the possibility of adjudications in which the defendant will be required to follow inconsistent courses of continuing conduct. This danger exists in those situations in which the defendant by reason of the legal relations involved can not, as a practical matter, pursue two different courses of conduct." See *Zinser*, 253 F.3d at 1194. That is not the case. Plaintiffs are seeking for Dollar Tree conduct itself in accordance with its stated policies which comply with state and federal law. Applying Dollar Tree's policies to the Plaintiffs in no way impairs Dollar Tree's ability to apply its policies to the rest of its employees.

Rule (b)(1)(B) authorizes class actions where individual actions might "as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1)(B). *McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975). This standard is met where "separate actions inescapably will alter the substance of the rights of others having similar claims." *Id.* (internal quotations omitted). Plaintiffs' action will not limit the rights of the other Dollar Tree employees. See *Id.* ("At worst, individual actions would leave unnamed members of the class with the same complexity and expense as if no prior actions had been brought.").

1 **6. Certification Under Rule 23(b)(2) Is Inappropriate.**

2 Rule 23(b)(2) authorizes class actions where “the party opposing the class
3 has acted or refused to act on grounds generally applicable to the class, thereby making
4 appropriate final injunctive relief or corresponding declaratory relief with respect to the
5 class as a whole.” Fed.R.Civ.P. 23(b)(2). Certification under this section “is appropriate
6 only where the primary relief sought is declaratory or injunctive. A class seeking
7 monetary damages may be certified pursuant to Rule 23(b)(2) where such relief is
8 merely incidental to [the] primary claim for injunctive relief.” *Zinser* at 1195 (citations and
9 internal quotation marks omitted); *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir.2003) (a
10 claim for monetary damages must be secondary to the primary claim for injunctive or
11 declaratory relief). Here Plaintiffs seek injunctive relief incidental to monetary relief.
12 Four of the Plaintiffs’ six causes of action seek only monetary relief, only the remaining
13 two causes of action seeks injunctive relief in addition to monetary relief and statutory
14 penalties. Moreover, Plaintiffs are both former employees to which only monetary relief
15 applies

16 **7. Common Issues Do Not Predominate.**

17 The predominance inquiry “focuses on the relationship between the
18 common and individual issues.” *Local Joint Executive Bd. of Culinary/Bartender Trust*
19 *Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Consequently, the
20 presence of common issues of fact or law sufficient to satisfy the requirements of Rule
21 23(a)(2) is not by itself sufficient to show that those common issues predominate.
22 *Hanlon*, 150 F.3d at 1022. The “predominance inquiry tests whether the proposed
23 classes are sufficiently cohesive to warrant adjudication by representation.” *Hanlon*, 150
24 F.3d at 1011 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). The
25 predominance inquiry measures the relative weight of the common claims against the
26 individualized inquiry. *Id.* “Implicit in the satisfaction of the predominance test is the
27 notion that the adjudication of common issues will help achieve judicial economy.” *Zinser*
28

1 at 1189 (9th Cir. 2001) (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th
2 Cir. 1996)).

3 In this case, the ability of each class member of the proposed class to
4 recover depends on a separate set of facts applicable only to him or her and will require
5 individualized proof employee by employee. Examination of the Compass system is not
6 enough. During their depositions, both Hansen and Cruz testified that it is impossible to
7 tell if manual alterations to time records are corrections or not. Hansen Dep. 635:9-23.
8 Cruz Dep. 454:1-15. The recorded time in the Compass system would have to be
9 compared against some other record of an employee's time, if such secondary source
10 even exists. Each employee would have to be examined as to the alterations to prove
11 that a violation occurred. Individual inquiries would predominate over any common
12 proof. In such cases, class certification is routinely denied because individualized issues
13 predominate. *Mateo v. M/S Kiso*, 805 F.Supp. 761, 774 (N.D. Cal., 1991) ("Here,
14 however, plaintiffs' wage and fraud claims arise from a complex course of conduct
15 involving multiple defendants and a series of different alleged promises and
16 misrepresentations... Second, even if common issues predominated here, the class
17 sought by plaintiffs is not manageable, and a class action would not be a superior format
18 for resolving the claims of the members of the proposed class.").

19 Accordingly, individualized inquiries will predominate. "If the main issues in
20 a case require the separate adjudication of each class member's individual claim or
21 defense, a [class] action would be inappropriate." *Zinser*, 253 F.3d at 1189.

22 **8. A Class Action Would Not Be Manageable Or Superior To**
23 **Individual Actions.**

24 Plaintiffs are unable to demonstrate that any of the common questions can
25 be resolved by proof that applies to all class members equally. Indeed, Plaintiffs cannot
26 present any plan to the trial Court for managing the complex issues of fact raised by the
27 class claims. The court must balance the manageability regarding the litigation of issues
28 common to the class as a whole against questions affecting individual class members.

